No. 29

IN THE

Supreme Court of the United States

October Term, 1949

JOHN S. HAYNES,

Petitioner,

v.

CINCINNATI, NEW ORLEANS and TEXAS PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT

[illegible] M. [illegible],
[illegible] J. [illegible],
Cincinnati, Ohio.
W. [illegible] [illegible],
Washington, D. C.,
Attorneys for Respondent.

Of Counsel:
Frost & Jacobs,
2900 Union Central Bldg.,
Cincinnati, Ohio.
[illegible] & [illegible],
Georgetown, Kentucky.
Sidney S. Alderman,
Washington, D. C.

The Johnson & Hardin Co., Law Printers
Cincinnati, Ohio

SUBJECT INDEX

CITATIONS

Cases

IN THE

Supreme Court of the United States

October Term, 1949

No. 29

JOHN S. HAYNES,

Petitioner,

v.

CINCINNATI, NEW ORLEANS and TEXAS PACIFIC RAILWAY COMPANY,

Respondent.

Brief of Cincinnati, New Orleans and Texas Pacific Railway Company, Respondent.[1]

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Kentucky is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (R. 17) is reported at 171 F. 2d 128.

JURISDICTION

The petition for writ of certiorari was filed on February 2, 1949, and was granted on April 4, 1949 (R. 18). Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The name of respondent was changed by order of this Court dated May 2, 1949, from Southern Railway System to the name now appearing.

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the employment status and seniority to which a veteran claims to be entitled by virtue of Section 8 of the Selective Training and Service Act of 1940, are of indefinite duration, when the claimed status and seniority are superior to and inconsistent with the status and seniority to which he is entitled under provisions of a collective bargaining agreement applicable to employees on furlough or leave of absence; or, whether the right to such alleged statutory status and seniority terminates upon the expiration of the first year of the veteran's reemployment, leaving his status and seniority then to be determined by the provisions of a collective bargaining agreement covering all employees, veterans and non-veterans.

2. Whether this cause is rendered moot by the expiration of more than one year's reemployment, accepted without protest.

STATEMENT OF CASE

The petitioner's statement of fact is substantially correct except that such statement overlooks the following:

1. that Haynes did not file his complaint until fifteen months after the date of his reemployment;
2. that the record discloses no protest made during those fifteen months after reemployment at the same job and classification Haynes left and with seniority as of July 6, 1940, *the date of his original employment.*

Furthermore, the petitioner before the United States Court of Appeals made no claim that he was entitled to back wages, and this aspect of the case, having not been urged before the Court of Appeals, cannot be presented as a justiciable controversy to this Court. *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458.

SUMMARY OF ARGUMENT

Respondent maintains that the decisions of the lower courts in this case be upheld by this Court on the following grounds:

I. The statutory protection afforded by Section 8 (c) of the Selective Training and Service Act which gives the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration to employment, terminates one year after his restoration to service.

II. This cause is rendered moot by the expiration of more than one year's reemployment, accepted without protest.

ARGUMENT

I. The Statutory Protection Afforded by Section 8 (c) of the Selective Training and Service Act Which Gives the Reemployed Veteran a Preferred Standing over Employees Not Veterans Having Identical Seniority Rights as of the Time of His Restoration to Employment, Terminates One Year After His Restoration to Service.

The petitioner, plaintiff below, sought to enforce his right as an honorably discharged veteran through the provisions of Section 8 of the Selective Training and Service Act, and jurisdiction of the District Court was based solely upon Section 8 of said Act.

In the petition filed in the District Court (R. 1) there is no allegation that machinist helpers returning from furlough or leave of absence, were entitled by contract express or implied, to be given positions and seniority as helper apprentices which positions they could or would have received had they not been absent.

Upon his return from the service, the petitioner was restored to the position which he left at the time he was

inducted into the Armed Services. Moreover, petitioner was considered as having been on furlough or leave of absence, just as any other employee, as provided by Section 8 (c) and given seniority as of July 6, 1940, the date of his original employment. However, petitioner, through this action, claims (1) that the Selective Training and Service Act gave him certain rights over and above those to which he would have been entitled under the collective bargaining agreement as an employee returning from furlough or leave of absence; and (2) that under said Act, he had the statutory right to claim a position other and different from that which he left to enter the Armed Forces, with a seniority status in such other position dating from the time he would have attained such position had he remained in the employ of the railroad, instead of going on furlough or leave of absence to enter the Armed Forces. Petitioner claims a retroactive seniority date in a position of helper apprentice (the position other than that of machinist helper which he left to enter the Armed Forces) as of the date "he would have had" such position, ignoring entirely the question of whether or not he would have been entitled to such position under the collective bargaining agreement as an employee on furlough or leave of absence.

Consequently, it is apparent that the claim of petitioner is for a special statutory status to which non-veteran employees on furlough or leave of absence would not be entitled. It is the contention of this respondent that even if petitioner could prove that he would have been promoted to the position of helper apprentice so as to give him a special statutory right under the Selective Training and Service Act, which it is believed cannot be proved on the merits, it was a right of limited duration, and could not be enforced at a time subsequent to one year from the date of petitioner's reemployment.

The respondent's contention is supported by the decision of this Court in *Trailmobile Company v. Whirls*, 331 U. S. 40, wherein the question involved concerned the *duration* of the veteran's restored statutory seniority standing. This Court in that case stated the issue as follows:

> . . . "whether under § 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues." (p. 51)

In the *Trailmobile* case the Government argued that under Section 8 (c) the veteran upon reemployment is entitled to retain indefinitely his prewar plus service-accumulated seniority and moreover, that such seniority cannot be taken away by the bargaining agreement or by the employer. This Court held that so much of the veteran's protection ends with the statutory year as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration.

In that case the veteran, Whirls, not only claimed that the statute entitled him to be restored to his former position without loss of seniority, and to be free from being discharged without cause one year thereafter, but also that it preserved his seniority status against any impairment for as long thereafter as his employment should continue. This Court rejected this last contention and held that after the expiration of the one year period the statute did not confer upon the veteran any different rights than those enjoyed by his non-veteran fellow employees.

The contention made by Haynes through the allegations in his petition discloses that Haynes is in even a more favorable reemployment status than Whirls, inasmuch as

Haynes has his seniority, his work, and his Union, while in the *Whirls* case, as set forth in the dissenting opinion, Whirls was left without any of the foregoing.

The respondent herein does not contend that after the statutory year of reemployment, Haynes would be unprotected in his employment status and seniority. Although the protection of the statute expired at the conclusion of one year, any contractual rights which the veteran enjoyed in connection with his employment would not automatically terminate; but the veteran would thereafter be left in the same category as any other employee and could only enforce his contractual rights through the same procedure as that available to non-veteran employees. Consequently, after the first year of his reemployment Haynes was in the same position as that of a non-veteran and retained his employment status and seniority under the collective bargaining agreement, but he did not retain the statutory preference over non-veterans enjoyed by him during the first year of reemployment.

Respondent respectfully submits that its position is upheld by the opinion of this Court in the *Trailmobile* case just discussed.

II. This Cause Is Rendered Moot by the Expiration of More Than One Year's Reemployment, Accepted Without Protest.

While the District Court sustained the motion to dismiss on the ground that the action was moot, relying on the *Trailmobile* case, *supra*, as authority, respondent contends that the dismissal was also proper because of the laches of the petitioner.

Petitioner, while in respondent's permanent employment, enlisted in the Armed Forces on February 1, 1942, and served until October 31, 1945, the date of his honorable discharge. On November 16, 1945, he duly applied for

reemployment and was reemployed the same day as machinist helper with seniority as of July 6, 1940, the same position and seniority which he held the day he entered the Armed Forces. *Fifteen months thereafter*, on February 14, 1947, petitioner filed his complaint herein alleging that respondent had not complied with the Selective Training and Service Act of 1940. Moreover, the record in this case does not reveal any protest made to respondent by the petitioner during the fifteen months preceding the filing of his complaint against what he now contends to be a wrongful restoration of employment.

There are numerous cases which hold that laches on the part of the returned veteran destroy his right to reinstatement and other benefits under the Selective Training and Service Act.

In *Dacey* v. *Bethlehem Steel Co.*, 66 F. Supp. 161, application for reemployment under the Act was made on or about October 1, 1944 while suit was not begun until about nine months later. The Court held that where the veteran delays an unreasonable length of time in enforcing his demands, it is unfair to the employer to be compelled to pay compensation for the interim period. The *Dacey* case is followed by the District Court in the case of *Thompson* v. *Chesapeake & O. Ry. Co.*, 76 F. Supp. 304, 308.

In the latter case, the Court also referred to *Kay* v. *General Cable Corporation*, 59 F. Supp. 358, and the statement of Judge Meaney at page 360 as follows:

> "The Act provides a definite course of procedure whereby the discharged veteran might immediately have recourse to the District Court upon the refusal of an employer to restore him to his former position. The Act contemplates that such action shall be taken immediately upon an employer's refusal to restore and specifically instruct that 'The court shall order a speedy hearing in any such case and shall advance it

on the calendar.' It follows that if proceedings are not instituted in the District Court until some six months following the veteran's discharge from service and the employer's refusal to restore him to his former position, notwithstanding that negotiations between the employer and the veteran have been held in the interim, it would be beyond the scope of the Act to compel the employer to compensate for such extended period."

That the employer should not be held responsible for the delay of the veteran in enforcing his demand, and should not be penalized because of such delay, is decided by the District Court in *Azzerone* v. *W. B. Coon Co.*, 73 F. Supp. 869.

In *Daniels* v. *Barfield*, 77 F. Supp. 283, the delay of a veteran for seven months after discharge to make formal demand for reinstatement and benefits under the Selective Training and Service Act was held so unreasonable as to amount to acquiescence in his employer's action and resulted in forfeiture of his rights under the Act.

The Court stated:

"The very essence of Sec. 308(e) is that of promptness. Delay not only deprives the Court of the opportunity of rendering prompt aid to those entitled to it, but places the defendant at a disadvantage in being lulled into a false sense of security. I am of the opinion that the delay on the part of the plaintiff was unreasonable and amounts to acquiescence in the action of the defendant and accordingly results in a forfeiture of his right to reinstatement and of the incidental right to demand compensation for loss of wages and benefit."

In *Anglin* v. *C. & O. Ry. Co.*, 77 F. Supp. 359, it was held that an unreasonable delay in enforcing a demand under the Selective Training and Service Act resulted in the refusal to award any compensation for the interim

period. To the same effect is *Noble* v. *International Nickel Co.*, 77 F. Supp. 352.

In *Polansky* v. *Elastic Stop Nut Corporation*, 78 F. Supp. 74, it was held that a veteran's right to back pay was lost by laches. Therein, the veteran's right to recover a wage differential pursuant to the Selective Training and Service Act upon the claim that the employer had failed to reinstate him to a proper position, was held to have been lost by laches where there was no indication that the veteran raised any determined objection or attempted any real effort to reach a settlement with employer until the institution of suit under the Act some thirteen months after his reemployment. The Court therein stated: "Such lack of diligence is not entitled to reward."

It is respectfully submitted that the delay of fifteen months evidenced by the record in this case between the date of reemployment and the filing of the complaint amounts to laches and acquiescence in the entire situation such as to warrant a forfeiture of any rights Haynes may have had, had he acted within a reasonable time.

Finally, respondent urges that the petitioner before the United States Court of Appeals made no claim concerning the recovery of back pay. This aspect of the case, having not been urged before the Court of Appeals, cannot be presented as a justiciable controversy to this Court and any argument made before this Court in support thereof, should be ignored. *Edward Hines Yellow Pine Trustees* v. *Martin*, (supra).

CONCLUSION

For the reasons stated, the statutory protection afforded by Sec. 8(c) of the Selective Training and Service Act was not available to the petitioner at the time he filed his complaint fifteen months after reemployment in the same job and classification he had left, and with seniority as of the

date of his original employment. The judgment below should be sustained.

Respectfully submitted,

CARL M. JACOBS,
CORNELIUS J. PETZHOLD,
Cincinnati, Ohio.
W. S. MACGILL,
Washington, D. C.
Attorneys for Respondent.

Of Counsel:
FROST & JACOBS,
2300 Union Central Bldg.,
Cincinnati, Ohio.
BRADLEY & BRADLEY,
Georgetown, Kentucky.
SIDNEY S. ALDERMAN,
Washington, D. C.

September, 1949.